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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91175319
Party	Plaintiff Intuitive Surgical, Inc.
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Signature	/mdk/
Date	02/19/2009
Attachments	ProtectiveMotion.pdf (7 pages)(239020 bytes) Exhibits ProMot.pdf (22 pages)(958335 bytes)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

INTUITIVE SURGICAL, INC., Opposer, v. DAVINCI RADIOLOGY ASSOCIATES, P.L., Applicant.	Opposition No. 91175319 Serial No. 78/728,786 Published: December 19, 2006

MOTION OF OPPOSER INTUITIVE SURGICAL, INC. FOR PROTECTIVE ORDER

Pursuant to 37 Code of Federal Regulations ("C.F.R.") Section 2.120(f) and Federal Rule of Civil Procedure ("FRCP") 26(c), Opposer Intuitive Surgical, Inc. ("Opposer") hereby requests that this Board enter a protective order for the handling of confidential and trade secret information in this Opposition Proceeding.

I. STATEMENT OF FACTS

Opposer initiated this Opposition Proceeding on January 18, 2007. To date, the Board has not expressly approved or applied a protective order in this Proceeding.

At the initiation of this Opposition Proceeding, it was not anticipated by counsel for Opposer that any confidential or trade secret information would be disclosed during discovery or the testimony periods in this Proceeding. Accordingly, Opposer did not seek at the outset of this Proceeding an agreement with Applicant regarding handling of confidential information.

On January 28, 2009, Opposer took the testimony deposition of its Senior Director of Marketing Services, Christopher Simmonds. On cross-examination by Applicant's counsel, Mr. Simmonds \responded to a single question regarding the price of Opposer's goods. The sales price of Opposer's products varies and encompasses a range depending upon a number of factors. Opposer's price information is commercially sensitive and not disclosed by Opposer except for disclosure of the actual and specific price to an individual purchaser in the context of a sale. Although certain Internet websites purport to provide pricing information for Opposer's goods, the purported information is inaccurate and not information provided or disseminated by Opposer.

At the time of Mr. Simmonds testimony deposition, counsel for Opposer was not aware that the sales price or range of sales prices of Opposer's goods was commercially confidential and sensitive information and, therefore, did not object to the question or designate the testimony as confidential. Counsel for Opposer learned only after the deposition that the information is commercially sensitive and confidential.

On February 3, 2009, Opposer brought the confidentiality of the price information to the attention of Applicant's counsel and requested that Applicant enter into an agreement to protect the confidential or trade secret information of the parties. *See* true and correct copy of the February 3, 2009 email correspondence from counsel for Oposser, Michelle Hirth, to counsel for Applicant, Matthew Vanden Bosch, attached hereto as Exhibit A. To that end, Opposer prepared and provided to Applicant a draft agreement protecting such confidential information (the "draft Agreement"). The draft Agreement was a slightly modified version of the Board's standard agreement, with the primary modification to Paragraph 8 therein intended to cover the situation presented here. *See* true and correct copy of the February 13, 2009 email correspondence from counsel for Opposer to counsel for Applicant, with draft Agreement, attached hereto as Exhibit

B. On February 16, 2009, Applicant refused to enter into any such agreement or protective order. *See* true and correct copy of the February 16, 2009 email correspondence from counsel for Applicant to counsel for Opposer attached hereto as Exhibit C. Accordingly, Opposer brings this motion for entry of a protective order in this case.

II. ARGUMENT

Opposer is seeking to have certain confidential and commercially sensitive information protected from disclosure in this Opposition Proceeding by way of the entry of a protective order by the Board. Specifically, Opposer seeks to have certain pricing information for its products, already inadvertently disclosed during deposition, protected from disclosure to the public. Further, should any other confidential, trade secret or commercially sensitive information be revealed during testimony in this Proceeding, Opposer seeks to have a Protective Order entered to govern the handling of such information.

The Board has inherent authority to enter a protective order governing the parties and the disclosure of information in opposition proceedings. *Glaxo Group Ltd. v. Genetics Institute Inc.*, 72 U.S.P.Q. 1607, 1608 (TTAB 2002). 37 C.F.R. § 2.120(f)[1] provides:

> Upon motion by a party from whom discovery is sought, and for good cause, the Trademark Trial and Appeal Board may make any order which justice requires to protect a party from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the types of orders provided by clauses (1) through (8), inclusive, of Rule 26(c) of the Federal Rules of Civil Procedure.

Among the orders the Board may make is that "confidential . . . commercial information not be revealed or be revealed only in a specified way." FRCP 26(c)((1)(G). Moreover, 37 C.F.R.

§ 2.116(g) was amended on November 1, 2007 and made retroactively applicable to all *inter partes* proceedings then pending before the Board. 72 Fed. Reg. 42,242, 42,242 (August 1, 2007). Under 37 C.F.R. § 2.116(g), the Board's standard protective order applies during discovery and trial in all opposition proceedings unless the parties have stipulated to or the Board has entered an alternate agreement or order. Here, no alternate agreement has been reached by the parties and no alternate protective order has been entered by the Board. Although the Board's standard protective order therefore applies, Opposer requests that the Board enter a slightly modified protective order that covers the pricing information already provided at the testimony deposition of Mr. Simmonds. The Protective Order proposed by Opposer is attached hereto as Exhibit D. The Board's own amended regulations making its standard protective order generally applicable in opposition proceedings illustrates the recognized necessity for the protection of confidential commercial information.

A protective order is appropriate if the material at issue is protectable and good cause exists for its protection from disclosure. *See* 37 C.F.R. § 2.120(f); *Star Scientific Inc. v. Carter*, 61 U.S.P.Q.2d 1252, 1255 (S.D. Ind. 2001). Pricing information has been held by courts to be protectable trade secrets or confidential commercial information. *Synergetics Inc. v. Hurst,* 81 U.S.P.Q.2d 1714, 1719-20 (8th Cir. 2007) (reference by the Court to pricing information for surgical instruments used in eye surgery as trade secrets); *Vesta Corset Co. v. Carmen Foundations Inc.,* 50 U.S.P.Q.2d 1219, 1220 (S.D. N.Y. 1999) ("[p]ricing and marketing information are widely held to be '*confidential* business information' that may be subject to a protective order"); Star *Scientific Inc. v. Carter*, 61 U.S.P.Q.2d 1252, 1255 (S.D. Ind. 2001).

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[1] This Proceeding was initiated on January 18, 2007. The November 1, 2007 amendment of 37 C.F.R. § 2.120(f) was not made retroactive. 72 Fed. Reg. 42,242, 42,242 (August 1, 2007). Therefore, the version of 37 C.F.R. § 2.120(f) in effect at that time this Proceeding was initiated applies here and has been quoted herein.

Good cause exists for the protection of Opposer's pricing information in this case. Opposer's goods are robotic surgical systems that are state-of-the-art in the health care field. In the past, at least one competitor has attempted to benefit from and infringe Opposer's goods. Public dissemination of pricing information for Opposer's goods, particularly to potential competitors, could lead to economic harm to Opposer and a competitive disadvantage in the marketplace. Certain Internet websites purport to list the pricing information for Opposer's goods. However, the information on those websites is not accurate and is not information provided or disseminated by Opposer. In fact, Opposer maintains the confidentiality of its pricing information except in the context of actual sales to individual purchasers. Counsel for Opposer present at the testimony deposition of Mr. Simmonds was not made aware that pricing information was commercially sensitive and confidential until after Mr. Simmonds' deposition had concluded. Opposer maintains the confidentiality of its pricing information and, given the economic harm and competitive disadvantage to Opposer attendant to public disclosure of that information, good cause exists for its protection in this case.

After the deposition of Mr. Simmonds, counsel for Opposer provided a slightly modified version of the Board's standard form protective order to counsel for Applicant and requested that Applicant agree to protect from disclosure the parties' confidential and commercially sensitive information. Inexplicably, Applicant refused to do so.[2] *See* Exhibits A-C hereto. The proposed Protective Order, attached hereto as Exhibit D, is essentially the Board's standard form protective order slightly modified at Paragraph 8 to apply to the testimony of Mr. Simmonds specifically at issue.

[2] The undersigned counsel for Opposer hereby certifies that she has conferred with counsel for Applicant regarding this matter and attempted, without success, to enter into an agreement for handling of confidential material in this Proceeding, as evidenced by Exhibits A-C hereto.

Entry of the proposed Protective Order by the Board will protect the commercially sensitive information of Opposer without prejudice to Applicant. Opposer has and will designate the single deposition question and answer at issue "confidential." Pursuant to the proposed Protective Order, Applicant and its counsel will have access to the information and/or material designed by Opposer as "confidential", including this small portion of Mr. Simmonds testimony deposition. Applicant and its counsel will be able to use that information, if necessary, in this Proceeding. The Protective Order would simply prevent Applicant and its counsel from disseminating the protected information to third parties and require that the protected information and references thereto be filed with the Board under seal to prevent public access to the information.

Opposer further requests that this Board rule on this Motion as soon as possible as Opposer must file its Notice of Reliance with the transcript of the testimony deposition of Mr. Simmonds and wishes to file the confidential portion of that transcript under seal pursuant to the proposed Protective Order.

III. CONCLUSION

For the foregoing reasons, Opposer Intuitive Surgical, Inc. requests this Board enter in this Opposition Proceeding the proposed Protective Order (Exhibit D hereto) protecting from disclosure the parties' confidential or trade secret information. Opposer Intuitive Surgical, Inc. further requests that, pursuant to its terms, the Protective Order be made applicable to the portion

of the testimony deposition of Christopher Simmonds taken on January 28, 2009 in this Opposition Proceeding.

Dated: February 19, 2009

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By _____
Michelle D. Kahn
Michelle J. Hirth
Attorneys for Opposer
INTUITIVE SURGICAL, INC.

Four Embarcadero Center
17th Floor
San Francisco, CA 94111
TEL: (415) 434-9100
FAX: (415) 434-3947

EXHIBIT A

Michelle Hirth

From: Michelle Hirth
Sent: Tuesday, February 03, 2009 12:32 PM
To: 'Matthew T. Vanden Bosch'
Cc: Michelle Kahn
Subject: DAVINCI DIAGNOSTIC IMAGING & Design Opposition Proceeding

Hi Matt,

I write about two matters involving the testimony depositions we just completed.

First, you are correct that I need to serve you the testimony deposition of Dr. Boyle and I will do so as soon as I receive it. I have learned from the Court Reporter in Florida that she will have the transcript and exhibits completed in the next few days. Under the rules, I must review the transcript and make any necessary corrections. You and I also agreed that Dr. Boyle can review the transcript for errors. Accordingly, we are planning to do the following:
[a] the Court Reporter will be sending a "read" letter to Dr. Boyle notifying him that the transcript is ready to review and requesting that he either go to the Court Reporter's office or your office to do so. He will then have an opportunity to review the transcript and make any corrections on an errata form. He will also need to sign the document before a notary or a Court Reporter and return the errata form and signed/notarized document to the Court Reporter.
[b] the Court Reporter will be simultaneously sending me certified copies of the transcript. I will immediately serve upon you one of the certified copies. I will have then complied with the rule and your client can review it per [a] above. I also will review the transcript for errors as required by the TTAB rules and will notify the Court Reporter of any necessary corrections.
[c] if there are corrections to be made, the Court Reporter will do so in the proper manner and will provide me with corrected copies and I will serve a copy on you.

Note that my initial service on you of the transcript (per [b] above satisfies the TTAB rule of service within 30 days of taking the testimony deposition.

Second, I have learned that at his testimony deposition Mr. Simmonds testified to one item that is confidential business information. I would have instructed him not to answer but only learned the information was confidential after his deposition had concluded. Accordingly, the Court Reporter is going to separate the particular question (which you asked) and answer from the transcript, though it will still be included in the full transcript. Normally, we would file that portion of the transcript with the Board under seal pursuant to a protective order. We can either enter into a formal protective order or simply agree in writing that we will both maintain this information as confidential (that includes from your client). Then we would file the transcript under seal and any place in either of our trial briefs in which the information is referenced also would have to be redacted and filed under seal. Please let me know as quickly as possible if you will agree to this. Otherwise, I will need to seek leave from the Board to file under seal.

I will be in Court this afternoon but in the office the rest of the week if you wish to discuss any of this.

Michelle

EXHIBIT B

Michelle Hirth

From: Michelle Hirth
Sent: Friday, February 13, 2009 6:16 PM
To: 'Matthew T. Vanden Bosch'
Cc: Michelle Kahn
Subject: DAVINCI DIAGNOSTIC IMAGING & Design/protective order.DOC

Attachments: DAVINCI DIAGNOSTIC IMAGING & Design/protective order.DOC

DAVINCI
NOSTIC IMAGING

Matt,

Attached is a draft agreement to keep designated information confidential. The TTAB has a form protective agreement/protective order that it uses (and is located on the USPTO website). One can make it either an agreement binding upon the parties or as an order to be signed by the Board. Either does the job. I made only minor modifications (to the deposition portion of the terms) to the TTAB version and made it an agreement.

Please review and let me know if you will agree as soon as possible. Please also note that it requires that we each have our client's sign as well as requires our signatures.

Also, you should have received the transcript of Dr. Boyle's deposition today. Please let me know if you did not. I also received today the correctly labeled version of the transcript from the Court Reporter and will forward that copy to you next week.

Thank you,
Michelle

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

INTUITIVE SURGICAL, INC., Opposer, v. DAVINCI RADIOLOGY ASSOCIATES, P.L., Applicant.	Opposition No. 91175319 Serial No. 78/728,786 Published: December 19, 2006

AGREEMENT FOR PROTECTING CONFIDENTIALITY OF INFORMATION REVEALED DURING BOARD PROCEEDING

Opposer Intuitive Surgical, Inc. ("Opposer') and Applicant DaVinci Radiology Associates, P.L. ("Applicant") (collectively the "Parties") hereby enter into this Agreement for Protecting Confidentiality of Information Revealed During Board Proceeding (the "Agreement") to protect confidential, trade secret and commercially sensitive information or documents disclosed during the Opposition Proceeding styled *Intuitive Surgical, Inc. v. DaVinci Radiology Associates, P.L.*, Opposition Proceeding No. 91175319.

The Parties agree to be bound by this Agreement, which is a slightly modified version of the Trademark Trial and Appeal Board's standard "Provisions for Protecting Confidentiality of Information Revealed During Board Proceeding. As used in this order, the term "information" covers both oral testimony and documentary material

Agreement of the Parties is indicated by the signatures of the Parties' attorneys and/or the Parties themselves at the conclusion of the Agreement. The terms are binding from the date the Parties or their attorneys sign the Agreement.

TERMS OF THE AGREEMENT

1) Classes of Protected Information.

The Rules of Practice in Trademark Cases provide that all *inter partes* proceeding files, as well as the involved registration and application files, are open to public inspection.

The terms of this order are not to be used to undermine public access to files. When appropriate, however, a Party or witness, on its own or through its attorney, may seek to protect the confidentiality of information by employing one of the following designations.

Confidential—Material to be shielded by the Board from public access.

Highly Confidential—Material to be shielded by the Board from public access and subject to agreed restrictions on access even as to the Parties and/or their attorneys.

Trade Secret/Commercially Sensitive—Material to be shielded by the Board from public access, restricted from any access by the Parties, and available for review by outside counsel for the Parties and, subject to the provisions of paragraph 4 and 5, by independent experts or consultants for the Parties.

2) Information Not to Be Designated as Protected.

Information may not be designated as subject to any form of protection if it (a) is, or becomes, public knowledge, as shown by publicly available writings, other than through violation of the terms of this document; (b) is acquired by a non-designating Party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating Party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; (d) is disclosed by a non-designating Party or non-party witness legally compelled to disclose the information; or (e) is disclosed by a non-designating Party with the approval of the designating Party.

3) Access to Protected Information.

The provisions of this order regarding access to protected information are subject to modification by written agreement of the Parties or their attorneys, or by motion filed with and approved by the Board.

Judges, attorneys, and other employees of the Board are bound to honor the Parties' designations of information as protected but are not required to sign forms acknowledging the terms and existence of this order. Court reporters, stenographers, video technicians or others who may be employed by the Parties or their attorneys to perform services incidental to this proceeding will be bound only to the extent that the Parties or their attorneys make it a condition of employment or obtain agreements from such individuals, in accordance with the provisions of paragraph 4.

- **Parties** are defined as including individuals, officers of corporations, partners of partnerships, and management employees of any type of business organization.

- **Attorneys** for Parties are defined as including **in-house counsel** and **outside counsel**, including support staff operating under counsel's direction, such as paralegals or legal assistants, secretaries, and any other employees or independent contractors operating under counsel's instruction.

- **Independent experts or consultants** include individuals retained by a Party for purposes related to prosecution or defense of the proceeding but who are not otherwise employees of either the Party or its attorneys.

- **Non-party witnesses** include any individuals to be deposed during discovery or trial, whether willingly or under subpoena issued by a court of competent jurisdiction over the witness.

Parties and their **attorneys** shall have access to information designated as **confidential** or **highly confidential**, subject to any agreed exceptions.

Outside counsel, but not in-house counsel, shall have access to information designated as **trade secret/commercially sensitive**.

Independent experts or consultants, **non-party witnesses**, and **any other individual** not otherwise specifically covered by the terms of this order may be afforded access to **confidential** or **highly confidential** information in accordance with the terms that follow in paragraph 4. Further, **independent experts or consultants** may have access to **trade secret/commercially sensitive** information if such access is agreed to by the Parties or ordered by the Board, in accordance with the terms that follow in paragraph 4 and 5.

4) Disclosure to Any Individual.

Prior to disclosure of protected information by any Party or its attorney to any individual not already provided access to such information by the terms of this order, the individual shall be informed of the existence of this order and provided with a copy to read. The individual will then be required to certify in writing that the order has been read and understood and that the terms shall be binding on the individual. No individual shall receive any protected information until the Party or attorney proposing to disclose the information has received the signed certification from the individual. A form for such certification is attached to this order. The Party or attorney receiving the completed form shall retain the original.

5) Disclosure to Independent Experts or Consultants.

In addition to meeting the requirements of paragraph 4, any Party or attorney proposing to share disclosed information with an independent expert or consultant must also notify the Party which designated the information as protected. Notification must be personally served or forwarded by certified mail, return receipt requested, and shall provide notice

of the name, address, occupation and professional background of the expert or independent consultant.

The Party or its attorney receiving the notice shall have ten (10) business days to object to disclosure to the expert or independent consultant. If objection is made, then the Parties must negotiate the issue before raising the issue before the Board. If the Parties are unable to settle their dispute, then it shall be the obligation of the Party or attorney proposing disclosure to bring the matter before the Board with an explanation of the need for disclosure and a report on the efforts the Parties have made to settle their dispute. The Party objecting to disclosure will be expected to respond with its arguments against disclosure or its objections will be deemed waived.

6) Responses to Written Discovery.

Responses to interrogatories under Federal Rule 33 and requests for admissions under Federal Rule 36, and which the responding Party reasonably believes to contain protected information shall be prominently stamped or marked with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing Party learns of its error, by informing all adverse Parties, in writing, of the error. The Parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

7) Production of Documents.

If a Party responds to requests for production under Federal Rule 34 by making copies and forwarding the copies to the inquiring Party, then the copies shall be prominently stamped or marked, as necessary, with the appropriate designation from paragraph 1. If the responding Party makes documents available for inspection and copying by the inquiring Party, all documents shall be considered protected during the course of inspection. After the inquiring Party informs the responding Party what documents are to be copied, the responding Party will be responsible for prominently stamping or marking the copies with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing Party learns of its error, by informing all adverse Parties, in writing, of the error. The Parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

8) Depositions.

Protected documents produced during a discovery deposition, or offered into evidence during a testimony deposition shall be orally noted as such by the producing or offering Party at the outset of any discussion of the document or information contained in the document. In addition, the documents must be prominently stamped or marked with the

appropriate designation.

During discussion of any non-documentary protected information, the interested Party shall make oral note of the protected nature of the information if aware of its protected nature at the time of the deposition. If unaware of the protected nature of the material or information at the time of the deposition, the interested Party shall notify the other Parties to the Proceeding as soon as practicable.

The transcript of any deposition and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the Party that took the deposition. During that 30-day period, either Party may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1. Appropriate stampings or markings should be made during this time. If no such designations are made, then the entire transcript and exhibits will be considered unprotected.

9) Filing Notices of Reliance.

When a Party or its attorney files a notice of reliance during the Party's testimony period, the Party or attorney is bound to honor designations made by the adverse Party or attorney, or non-party witness, who disclosed the information, so as to maintain the protected status of the information.

10) Briefs.

When filing briefs, memoranda, or declarations in support of a motion, or briefs at final hearing, the portions of these filings that discuss protected information, whether information of the filing Party, or any adverse Party, or any non-party witness, should be redacted. The rule of reasonableness for redaction is discussed in paragraph 12 of this order.

11) Handling of Protected Information.

Disclosure of information protected under the terms of this order is intended only to facilitate the prosecution or defense of this case. The recipient of any protected information disclosed in accordance with the terms of this order is obligated to maintain the confidentiality of the information and shall exercise reasonable care in handling, storing, using or disseminating the information.

12) Redaction; Filing Material With the Board.

When a Party or attorney must file protected information with the Board, or a brief that discusses such information, the protected information or portion of the brief discussing the same should be redacted from the remainder. A rule of reasonableness should dictate

how redaction is effected.

Redaction can entail merely covering a portion of a page of material when it is copied in anticipation of filing but can also entail the more extreme measure of simply filing the entire page under seal as one that contains primarily confidential material. If only a sentence or short paragraph of a page of material is confidential, covering that material when the page is copied would be appropriate. In contrast, if most of the material on the page is confidential, then filing the entire page under seal would be more reasonable, even if some small quantity of non-confidential material is then withheld from the public record. Likewise, when a multi-page document is in issue, reasonableness would dictate that redaction of the portions or pages containing confidential material be effected when only some small number of pages contain such material. In contrast, if almost every page of the document contains some confidential material, it may be more reasonable to simply submit the entire document under seal. **Occasions when a whole document or brief must be submitted under seal should be very rare**.

Protected information, and pleadings, briefs or memoranda that reproduce, discuss or paraphrase such information, shall be filed with the Board under seal. The envelopes or containers shall be prominently stamped or marked with a legend in substantially the following form:

CONFIDENTIAL

This envelope contains documents or information that are subject to a protective order or agreement. The confidentiality of the material is to be maintained and the envelope is not to be opened, or the contents revealed to any individual, except by order of the Board.

13) Acceptance of Information; Inadvertent Disclosure.

Acceptance by a Party or its attorney of information disclosed under designation as protected shall not constitute an admission that the information is, in fact, entitled to protection. Inadvertent disclosure of information which the disclosing Party intended to designate as protected shall not constitute waiver of any right to claim the information as protected upon discovery of the error.

14) Challenges to Designations of Information as Protected.

If the Parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing Party. If the Parties are unable to resolve their differences, the Party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation, or as soon as practicable after the basis for

challenge is known. When a challenge is made long after a designation of information as protected, the challenging Party will be expected to show why it could not have made the challenge at an earlier time.

The Party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

15) Board's Jurisdiction; Handling of Materials After Termination.

The Board's jurisdiction over the Parties and their attorneys ends when this proceeding is terminated. A proceeding is terminated only after a final order is entered and either all appellate proceedings have been resolved or the time for filing an appeal has passed without filing of any appeal.

The Parties may agree that archival copies of evidence and briefs may be retained, subject to compliance with agreed safeguards. Otherwise, within 30 days after the final termination of this proceeding, the Parties and their attorneys shall return to each disclosing Party the protected information disclosed during the proceeding, and shall include any briefs, memoranda, summaries, and the like, which discuss or in any way refer to such information. In the alternative, the disclosing Party or its attorney may make a written request that such materials be destroyed rather than returned.

16) Other Rights of the Parties and Attorneys.

This order shall not preclude the Parties or their attorneys from making any applicable claims of privilege during discovery or at trial. Nor shall the order preclude the filing of any motion with the Board for relief from a particular provision of this order or for additional protections not provided by this order.

By Agreement of the Following, effective January 19, 2009

Frank Nguyen, Intuitive Surgical, Inc.

Thomas Boyle, M.D., DaVinci Radiology Associates, P.L.]

Michelle Kahn, Esq.
Michelle Hirth, Esq.
Sheppard, Mullin, Richter & Hampton, LLP

Matthew Vanden Bosch, Esq.
Law Offices of Matthew Vanden Bosch

EXHIBIT C

Michelle Hirth

From: Matthew T. Vanden Bosch [mvbosch@comcast.net]
Sent: Monday, February 16, 2009 7:17 PM
To: Michelle Hirth
Subject: RE: DAVINCI DIAGNOSTIC IMAGING & Design/protective order.DOC

Dear Michelle,

I cannot agree to enter into a protective order.

Very truly yours,

Matthew T. Vanden Bosch
Attorney at Law
301 Clematis Avenue
Suite 3000
West Palm Beach, Florida 33401
p: 561-736-4696
f: 561-736-4697
e: mvbosch@comcast.net

From: Michelle Hirth [mailto:MHirth@sheppardmullin.com]
Sent: Friday, February 13, 2009 9:16 PM
To: Matthew T. Vanden Bosch
Cc: Michelle Kahn
Subject: DAVINCI DIAGNOSTIC IMAGING & Design/protective order.DOC

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Matt,

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Please review and let me know if you will agree as soon as possible. Please also note that it requires that we each have our client's sign as well as requires our signatures.

Also, you should have received the transcript of Dr. Boyle's deposition today. Please let me know if you did not. I also received today the correctly labeled version of the transcript from the Court Reporter and will forward that copy to you next week.

Thank you,
Michelle

SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP
ATTORNEYS AT LAW

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Michelle Hirth
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MHirth@sheppardmullin.com | *Bio*

EXHIBIT D

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

INTUITIVE SURGICAL, INC., Opposer, v. DAVINCI RADIOLOGY ASSOCIATES, P.L., Applicant.	Opposition No. 91175319 Serial No. 78/728,786 Published: December 19, 2006

PROTECTIVE ORDER GOVERNING CONFIDENTIALITY OF INFORMATION REVEALED DURING BOARD PROCEEDING

Information disclosed by any party or non-party witness during this Proceeding may be considered confidential, a trade secret, or commercially sensitive by a party or witness. To preserve the confidentiality of the information so disclosed, the Board hereby orders the parties Opposer Intuitive Surgical, Inc. and Applicant DaVinci Radiology Associates, P.L. (collectively the "Parties"; singly a "Party") be bound by the provisions of this Protective Order (the "Order"). As used in this Order, the term "information" covers both oral testimony and documentary material.

The terms of this Order are binding as of the date it is signed by a Board attorney or judge and apply to any discovery or testimony designated by a Party as "Confidential", "Highly Confidential" or "Trade Secret/Commercially Sensitive" during the Discovery and Testimony Periods in this Proceeding, even if so designated before the date this Order is signed by a Board attorney or judge.

TERMS OF THE AGREEMENT

1) Classes of Protected Information.

The Rules of Practice in Trademark Cases provide that all *inter partes* proceeding files, as well as the involved registration and application files, are open to public inspection. The terms of this Order are not to be used to undermine public access to files. When

appropriate, however, a Party or witness, on its own or through its attorney, may seek to protect the confidentiality of information by employing one of the following designations.

Confidential—Material to be shielded by the Board from public access.

Highly Confidential—Material to be shielded by the Board from public access and subject to agreed restrictions on access even as to the Parties and/or their attorneys.

Trade Secret/Commercially Sensitive—Material to be shielded by the Board from public access, restricted from any access by the Parties, and available for review by outside counsel for the Parties and, subject to the provisions of paragraph 4 and 5, by independent experts or consultants for the Parties.

2) Information Not to Be Designated as Protected.

Information may not be designated as subject to any form of protection if it (a) is, or becomes, public knowledge, as shown by publicly available writings, other than through violation of the terms of this document; (b) is acquired by a non-designating Party or non-party witness from a third party lawfully possessing such information and having no obligation to the owner of the information; (c) was lawfully possessed by a non-designating Party or non-party witness prior to the opening of discovery in this proceeding, and for which there is written evidence of the lawful possession; (d) is disclosed by a non-designating Party or non-party witness legally compelled to disclose the information; or (e) is disclosed by a non-designating Party with the approval of the designating Party.

3) Access to Protected Information.

The provisions of this Order regarding access to protected information are subject to modification by written agreement of the Parties or their attorneys, or by motion filed with and approved by the Board.

Judges, attorneys, and other employees of the Board are bound to honor the Parties' designations of information as protected but are not required to sign forms acknowledging the terms and existence of this order. Court reporters, stenographers, video technicians or others who may be employed by the Parties or their attorneys to perform services incidental to this proceeding will be bound only to the extent that the Parties or their attorneys make it a condition of employment or obtain agreements from such individuals, in accordance with the provisions of paragraph 4.

- **Parties** are defined as including individuals, officers of corporations, partners of partnerships, and management employees of any type of business organization.

- **Attorneys** for Parties are defined as including **in-house counsel** and **outside counsel**,

including support staff operating under counsel's direction, such as paralegals or legal assistants, secretaries, and any other employees or independent contractors operating under counsel's instruction.

- **Independent experts or consultants** include individuals retained by a Party for purposes related to prosecution or defense of the proceeding but who are not otherwise employees of either the Party or its attorneys.

- **Non-party witnesses** include any individuals to be deposed during discovery or trial, whether willingly or under subpoena issued by a court of competent jurisdiction over the witness.

Parties and their **attorneys** shall have access to information designated as **confidential** or **highly confidential**, subject to any agreed exceptions.

Outside counsel, but not in-house counsel, shall have access to information designated as **trade secret/commercially sensitive**.

Independent experts or consultants, non-party witnesses, and **any other individual** not otherwise specifically covered by the terms of this order may be afforded access to **confidential** or **highly confidential** information in accordance with the terms that follow in paragraph 4. Further, **independent experts or consultants** may have access to **trade secret/commercially sensitive** information if such access is agreed to by the Parties or ordered by the Board, in accordance with the terms that follow in paragraph 4 and 5.

4) Disclosure to Any Individual.

Prior to disclosure of protected information by any Party or its attorney to any individual not already provided access to such information by the terms of this Order, the individual shall be informed of the existence of this Order and provided with a copy to read. The individual will then be required to certify in writing that the Order has been read and understood and that the terms shall be binding on the individual. No individual shall receive any protected information until the Party or attorney proposing to disclose the information has received the signed certification from the individual. A form for such certification is attached to this Order. The Party or attorney receiving the completed form shall retain the original.

5) Disclosure to Independent Experts or Consultants.

In addition to meeting the requirements of paragraph 4, any Party or attorney proposing to share disclosed information with an independent expert or consultant must also notify the Party which designated the information as protected. Notification must be personally served or forwarded by certified mail, return receipt requested, and shall provide notice of the name, address, occupation and professional background of the expert or

independent consultant.

The Party or its attorney receiving the notice shall have ten (10) business days to object to disclosure to the expert or independent consultant. If objection is made, then the Parties must negotiate the issue before raising the issue before the Board. If the Parties are unable to settle their dispute, then it shall be the obligation of the Party or attorney proposing disclosure to bring the matter before the Board with an explanation of the need for disclosure and a report on the efforts the Parties have made to settle their dispute. The Party objecting to disclosure will be expected to respond with its arguments against disclosure or its objections will be deemed waived.

6) Responses to Written Discovery.

Responses to interrogatories under Federal Rule 33 and requests for admissions under Federal Rule 36, and which the responding Party reasonably believes to contain protected information shall be prominently stamped or marked with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing Party learns of its error, by informing all adverse Parties, in writing, of the error. The Parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

7) Production of Documents.

If a Party responds to requests for production under Federal Rule 34 by making copies and forwarding the copies to the inquiring Party, then the copies shall be prominently stamped or marked, as necessary, with the appropriate designation from paragraph 1. If the responding Party makes documents available for inspection and copying by the inquiring Party, all documents shall be considered protected during the course of inspection. After the inquiring Party informs the responding Party what documents are to be copied, the responding Party will be responsible for prominently stamping or marking the copies with the appropriate designation from paragraph 1. Any inadvertent disclosure without appropriate designation shall be remedied as soon as the disclosing Party learns of its error, by informing all adverse Parties, in writing, of the error. The Parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

8) Depositions.

Protected documents produced during a discovery deposition or offered into evidence during a testimony deposition shall be orally noted as such by the producing or offering Party at the outset of any discussion of the document or information contained in the document. In addition, the documents must be prominently stamped or marked with the appropriate designation.

During discussion of any non-documentary protected information, the interested Party shall make oral note of the protected nature of the information at the time of the deposition. Any inadvertent disclosure without appropriate oral note of the protected nature of the information shall be remedied as soon as the disclosing Party learns of its error, by informing all adverse Parties, in writing, of the error. The Parties should inform the Board only if necessary because of the filing of protected information not in accordance with the provisions of paragraph 12.

The transcript of any deposition and all exhibits or attachments shall be considered protected for 30 days following the date of service of the transcript by the Party that took the deposition. During that 30-day period, either Party may designate the portions of the transcript, and any specific exhibits or attachments, that are to be treated as protected, by electing the appropriate designation from paragraph 1. Appropriate stampings or markings should be made during this time. If no such designations are made, then the entire transcript and exhibits will be considered unprotected.

9) Filing Notices of Reliance.

When a Party or its attorney files a notice of reliance during the Party's testimony period, the Party or attorney is bound to honor designations made by the adverse Party or attorney, or non-party witness, who disclosed the information, so as to maintain the protected status of the information.

10) Briefs.

When filing briefs, memoranda, or declarations in support of a motion, or briefs at final hearing, the portions of these filings that discuss protected information, whether information of the filing Party, or any adverse Party, or any non-party witness, should be redacted. The rule of reasonableness for redaction is discussed in paragraph 12 of this Order.

11) Handling of Protected Information.

Disclosure of information protected under the terms of this Order is intended only to facilitate the prosecution or defense of this case. The recipient of any protected information disclosed in accordance with the terms of this order is obligated to maintain the confidentiality of the information and shall exercise reasonable care in handling, storing, using or disseminating the information.

12) Redaction; Filing Material With the Board.

When a Party or attorney must file protected information with the Board, or a brief that discusses such information, the protected information or portion of the brief discussing the same should be redacted from the remainder. A rule of reasonableness should dictate

how redaction is effected.

Redaction can entail merely covering a portion of a page of material when it is copied in anticipation of filing but can also entail the more extreme measure of simply filing the entire page under seal as one that contains primarily confidential material. If only a sentence or short paragraph of a page of material is confidential, covering that material when the page is copied would be appropriate. In contrast, if most of the material on the page is confidential, then filing the entire page under seal would be more reasonable, even if some small quantity of non-confidential material is then withheld from the public record. Likewise, when a multi-page document is in issue, reasonableness would dictate that redaction of the portions or pages containing confidential material be effected when only some small number of pages contain such material. In contrast, if almost every page of the document contains some confidential material, it may be more reasonable to simply submit the entire document under seal. Occasions when a whole document or brief must be submitted under seal should be very rare.

Protected information, and pleadings, briefs or memoranda that reproduce, discuss or paraphrase such information, shall be filed with the Board under seal. The envelopes or containers shall be prominently stamped or marked with a legend in substantially the following form:

CONFIDENTIAL

This envelope contains documents or information that are subject to a protective order or agreement. The confidentiality of the material is to be maintained and the envelope is not to be opened, or the contents revealed to any individual, except by order of the Board.

13) Acceptance of Information; Inadvertent Disclosure.

Acceptance by a Party or its attorney of information disclosed under designation as protected shall not constitute an admission that the information is, in fact, entitled to protection. Inadvertent disclosure of information which the disclosing Party intended to designate as protected shall not constitute waiver of any right to claim the information as protected upon discovery of the error.

14) Challenges to Designations of Information as Protected.

If the Parties or their attorneys disagree as to whether certain information should be protected, they are obligated to negotiate in good faith regarding the designation by the disclosing Party. If the Parties are unable to resolve their differences, the Party challenging the designation may make a motion before the Board seeking a determination of the status of the information.

A challenge to the designation of information as protected must be made substantially contemporaneous with the designation, or as soon as practicable after the basis for

challenge is known. When a challenge is made long after a designation of information as protected, the challenging Party will be expected to show why it could not have made the challenge at an earlier time.

The Party designating information as protected will, when its designation is timely challenged, bear the ultimate burden of proving that the information should be protected.

15) Board's Jurisdiction; Handling of Materials After Termination.

The Board's jurisdiction over the Parties and their attorneys ends when this proceeding is terminated. A proceeding is terminated only after a final order is entered and either all appellate proceedings have been resolved or the time for filing an appeal has passed without filing of any appeal.

The Parties may agree that archival copies of evidence and briefs may be retained, subject to compliance with agreed safeguards. Otherwise, within 30 days after the final termination of this proceeding, the Parties and their attorneys shall return to each disclosing Party the protected information disclosed during the proceeding, and shall include any briefs, memoranda, summaries, and the like, which discuss or in any way refer to such information. In the alternative, the disclosing Party or its attorney may make a written request that such materials be destroyed rather than returned.

16) Other Rights of the Parties and Attorneys.

This Order shall not preclude the Parties or their attorneys from making any applicable claims of privilege during discovery or at trial. Nor shall the Order preclude the filing of any motion with the Board for relief from a particular provision of this Order or for additional protections not provided by this Order.

By Order of the Board, effective _____.

_____

Name:
Board Attorney or Judge